

[2] On 31 March 2008 the authority support officer, on the instruction of the Authority member, advised the parties that any costs submissions should be received *within 14 days*. On 17 April i.e. 17 days later, Ms Shaw, on behalf of the CDHB, filed submissions in respect to costs.

[3] On 17 April 2008 Mr McKenzie, for Ms Watson, emailed the Authority:

These costs submissions are too late. The timeframe for seeking costs expired on Monday last.

The Authority is funtus officio in the applicant's submission and especially where there is no explanation for the delay (or even an attempt to explain the same), the authority should not and cannot receive the submissions. Can you advise the authority's view on the subject as it may well resolve the need to reply to the same.

[4] For reasons which need not be canvassed in this determination, the application for costs in this matter was transferred to me for determination. On 29 April 2008 I required the parties to file and serve further submissions. In particular I required Ms Shaw to file submissions in respect to the reasons for the lateness of her application for costs and, subsequently, Mr McKenzie to file submissions regarding both the question of lateness and a response to the application for costs.

Lateness of submission

[5] Ms Shaw, for CDHB, in her submission, apologises for the lateness of her application for costs which she says were prepared well before they were due but were not filed in time *entirely due to an oversight* on her part. She argues that the Authority has regularly accepted late filing of documents and that to change this practice without notice would be unfair and would prejudice her client. She says that Ms Watson was already on notice that costs would be sought and she is in no way prejudiced by the delay in filing of the submissions which was, in any event, very short. She argues that this matter has already been drawn out and debating this issue (the late filing of submissions) further delayed the final resolution.

[6] For Ms Watson Mr McKenzie argues that as no submissions had been received by the designated date (15 April) the Authority is *functus officio*. He also argues that the CDHB's failure to correctly remedy its lateness i.e. by not seeking an extension of time, rendered its application *fatally flawed*. He argues that if the Authority permitted breach of timeframes without demur, there would seem little need for the power contained in section 221(c) of the Employment Relations Act (the Act) to extend timeframes; that for the Authority to receive the Board's costs submissions an extension under section 221(c) is required.

[7] I do not accept Mr McKenzie's argument that the Authority is *functus officio* in this matter. Such an argument would render section 221 ineffective. Section 221 does not indicate any limitation on the timeframes in which an application for an extension of time can be made. Mr McKenzie does not argue that his client was in any way prejudiced by the lateness of CDHB's submissions nor do I perceive that any such prejudice exists. **I therefore accept CDHB's submissions in respect to costs.** However although the submissions were only a couple of days late, that lateness did require additional submissions from the parties and this additional cost should be reflected in the final costs award made.

The application for costs

[8] Ms Shaw, for CDHB seeks reimbursement of costs on a full indemnity basis. She says that while Ms Watson was not in the usual sense the losing party she withdrew her claim at a very late stage in the proceedings causing the Board unnecessary cost and that under these circumstances the usual principle of determining costs should apply. She argues that Ms Watson's application for compliance was unnecessarily technical and litigious and there were other options available to her. Ms Shaw says that if Ms Watson had proceeded as suggested by the Authority at an early stage, both she and the Board would have avoided incurring unnecessary costs while preserving Ms Watson's legal rights. Ms Shaw submits that while Ms Watson's was quite entitled to exercise her legal rights, looking at her conduct over all she acted in a vexatious and unreasonable manner. Ms Shaw has produced invoices which indicated that her client's total costs amounted to some \$11,700 which, she says are reasonable in the circumstances.

[9] For Ms Watson Mr McKenzie argues that costs should lie where they fall. He says that CDHB is a large employer and there is no suggestion of hardship should they not receive a contribution towards their costs. He also argues that in the absence of a substantive determination by the Authority it is impossible for the Authority to determine strengths and weaknesses with any confidence. He suggests that, had Ms Watson been unsuccessful in her application, (rather than withdrawing) she would have had a right to challenge, and perhaps succeeded on challenge. He also submits that the Boards conduct contributed to the level of costs incurred and that the nature of the case was of benefit to the Board in its dealing with the applicant and other employees in similar situations in the future. Finally, Mr McKenzie argues that Ms Watson's financial position is dire and she has expended a good deal of money in an effort to retain her employment.

[10] In his submissions Mr McKenzie also alludes to the fact that his client is *considering making a further claim alleging constructive dismissal and unjustified disadvantage against CDHB* and that any award for costs should be stayed pending the outcome of any new application. However as at the time of writing no new statement of problem had been received. In the absence of such a statement it is not appropriate that a stay be considered.

Determination

[11] The principles upon which the Authority uses its discretion in awarding costs are now well established and were set out by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* (2005) 1 ERNZ 808. Had Ms Watson not withdrawn her application and not been successful she would have faced the real possibility of being required to make a contribution towards CDHB's costs. However it is unlikely, in my assessment, that such contribution would have been anything other than the usual, modest award in line with the Authority's usual practice. Having reviewed the Authority's file it is clear that while there was more than the usual single telephone conference and additional discussion surrounding the direction to mediation and other periphery issues, the actual investigation meeting took only the single day scheduled.

[12] Allowing a discount for the additional time required by Ms Watson's representative to address the lateness of CDHB's submissions, **Ms Watson is to pay the Canterbury District Health Board \$1500.00 as a contribution towards the Board's costs.**

James Wilson

Member of the Employment Relations Authority